14-419
No. _____

OCT 7 - 2014

In The

Supreme Court of the United States

SILA LUIS,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents an opportunity for the Court to resolve a circuit split on a question of fundamental importance to the adversarial system of justice: whether the restraint of *untainted* assets needed to retain counsel of choice in a criminal case violates the Fifth and Sixth Amendments.

Last Term, this Court reaffirmed that *tainted* assets may be restrained pre-trial (and forfeited upon conviction), even when those assets are needed to retain counsel of choice. *Kaley v. United States*, ___ U.S. ___, 134 S. Ct. 1090, 1105 (2014); *accord United States v. Monsanto*, 491 U.S. 600, 616 (1989); *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617, 631 (1989). In rejecting constitutional challenges to pre-trial restraints under 21 U.S.C. § 853, it was significant to this Court that the restrained assets were tainted, *i.e.*, traceable to the alleged criminal conduct. *See, e.g., Kaley*, 134 S. Ct. at 1095 (noting that "no one contests that the assets in question derive from, or were used in committing, the offenses"). Although the Solicitor General and three Justices appeared to agree that the restraint of untainted assets would pose constitutional problems, *see id.* at 1095 n.3; *id.* at 1108 & n.2 (Roberts, C.J., dissenting), the majority opinion in *Kaley* "[did] not opine on the matter." *Kaley*, 134 S. Ct. at 1095 n.3.

The Fourth Circuit has expressly held that "[w]hile *Caplin* [*& Drysdale, Chtd.*] made absolutely clear that there is no Sixth Amendment right for a

QUESTION PRESENTED – Continued

defendant to obtain counsel using tainted funds, [a defendant] still possesses a qualified Sixth Amendment right to use wholly legitimate funds to hire the attorney of his choice." *United States v. Farmer*, 274 F.3d 800, 804 (4th Cir. 2001).

Addressing a pretrial restraint under 18 U.S.C. § 1345, the Eleventh Circuit in this case upheld a preliminary injunction that currently restrains all of petitioner's assets, including undisputedly untainted funds needed by her to engage private counsel in her criminal case. Ignoring the Fourth Circuit's holding in *Farmer* and the important and historical distinction between tainted and untainted assets, the Eleventh Circuit interpreted *Kaley*, *Monsanto* and *Caplin & Drysdale, Chtd.* to "foreclose" petitioner's constitutional challenge to the pretrial restraint of legitimate, untainted funds she needs to retain counsel of choice. *United States v. Luis*, No. 13-13719, 564 F. App'x. 493, 494 (11th Cir. 2014).

Given the conflict between the circuits on a constitutional issue significant to criminal defendants, the criminal defense bar and the administration of justice, this petition presents the following question for certiorari review:

> Whether the pretrial restraint of a criminal defendant's legitimate, untainted assets (those not traceable to a criminal offense) needed to retain counsel of choice violates the Fifth and Sixth Amendments.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioner, Sila Luis, was the defendant in the district court and the appellant in the Eleventh Circuit. Sila Luis is an individual, so there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

The respondent is the United States of America.

Myriam Acevedo and Elsa Ruiz were party defendants in the district court. They did not contest the injunction and did not appeal.

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PETITION FOR WRIT OF CERTIORARI

Sila Luis petitions for a writ of certiorari to review the Eleventh Circuit Court of Appeals' judgment in *United States v. Luis*, No. 13-13719, 564 F. App'x 493 (11th Cir. 2014). App. 1-3.

ORDERS AND OPINIONS OF THE COURTS BELOW

The published opinion of the district court denying petitioner's motion for release of assets to retain counsel of choice and granting the government's motion for a preliminary injunction in the amount of $45 million is reported at *United States v. Luis*, 966 F. Supp. 2d 1321 (S.D. Fla. June 21, 2013) and reproduced as App. 8-34.

The preliminary injunction entered by the district court on June 24, 2013 is reproduced as App. 4-7.

The opinion of the Eleventh Circuit affirming the district court's orders is reported at *United States v. Luis*, No. 13-13719, 564 F. App'x 493 (11th Cir. 2014) and reproduced as App. 1-3.

The Eleventh Circuit's order denying rehearing and rehearing en banc entered on July 9, 2014 is reproduced as App. 35-36.

JURISDICTION

The district court had subject matter jurisdiction over this civil case pursuant to 28 U.S.C. § 1331, because it involved a complaint for a preliminary injunction filed by the United States under a federal statute, 18 U.S.C. § 1345. The Eleventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), because it involved an appeal from an order granting a preliminary injunction. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be deprived of property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

18 U.S.C. § 1345 provides:

(a)(1) If a person is –

> **(A)** violating or about to violate this chapter or section 287, 371 (insofar as such violation involves a conspiracy to

defraud the United States or any agency thereof), or 1001 of this title;

(B) committing or about to commit a banking law violation (as defined in section 3322(d) of this title); or

(C) committing or about to commit a Federal health care offense;

the Attorney General may commence a civil action in any Federal court to enjoin such violation.

(2) If a person is alienating or disposing of property, or intends to alienate or dispose of property, obtained as a result of a banking law violation (as defined in section 3322(d) of this title) or a Federal health care offense or property which is traceable to such violation, the Attorney General may commence a civil action in any Federal court –

(A) to enjoin such alienation or disposition of property; or

(B) for a restraining order to –

(i) prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any such property or property of equivalent value; and

(ii) appoint a temporary receiver to administer such restraining order.

(3) A permanent or temporary injunction or restraining order shall be granted without bond.

(b) The court shall proceed as soon as practicable to the hearing and determination of such an action, and may, at any time before final determination, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought. A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

A. Introduction

Petitioner Sila Luis is an indicted defendant in a criminal case before U.S. District Judge Marcia Cooke in the Southern District of Florida. *United States v. Luis*, Case No. 12-CR-20751-MGC (S.D. Fla. Oct. 3, 2012) (DE3) (available on PACER). Petitioner is charged with health care fraud offenses. She wishes to retain private counsel to defend her in that criminal case. The government estimates a criminal trial lasting 15 days. *Id.* at 18.

In this related, contemporaneous civil action brought by the government under 18 U.S.C. § 1345, U.S. District Judge Paul Huck entered a preliminary injunction prohibiting petitioner from spending any of her own money, including undisputedly *untainted* funds that she needs to retain counsel in the criminal case. App. 4-7. In a published opinion, Judge Huck rejected petitioner's argument that the Constitution prohibits the pretrial restraint of untainted assets needed to pay counsel of choice. *United States v. Luis*, 966 F. Supp. 2d 1321, 1334 (S.D. Fla. June 21, 2013), App. 8-34. In Judge Huck's view, "there is no Sixth Amendment right to use untainted, substitute assets to hire counsel." App. 32.

The Eleventh Circuit affirmed, concluding that this Court's jurisprudence addressing the pretrial restraint and forfeiture of *tainted* assets – *Kaley v. United States*, ___ U.S. ___, 134 S. Ct. 1090 (2014), *United States v. Monsanto*, 491 U.S. 600 (1989), and *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617 (1989) – foreclosed a constitutional challenge to the restraint of *untainted* assets. *United States v. Luis*, No. 13-13719, 564 F. App'x 493, 494 (11th Cir. 2014). App. 1-3.

Because the injunction prevents petitioner from using her untainted assets to retain counsel, Judge Cooke has stayed the related criminal proceedings (with the government's consent) pending the outcome of this petition.

B. The Statutory Scheme

When the government suspects that a defendant is (or has) engaged in violations of certain federal fraud statutes, including Medicare fraud, 18 U.S.C. § 1345 authorizes the government to initiate a civil action in order to "preserve the defendant's assets until a judgment requiring restitution or forfeiture [can] be obtained." *United States v. DBB, Inc.*, 180 F.3d 1277, 1284 (11th Cir. 1999). To accomplish this goal, section 1345 authorizes the court to enter an order restraining "property, obtained as a result of a [Federal health care offense] or property which is traceable to such violation or property of equivalent value." 18 U.S.C. § 1345(a)(2)(B)(i). As the district court explained: "The 'equivalent value' language means that when some of the assets that were obtained as a result of fraud cannot be located, a person's substitute, untainted assets may be restrained instead." App. 10.

The statute calls for a "hearing and determination of such an action," but does not set forth the standard of proof. 18 U.S.C. § 1345(b). "A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent [defendant], discovery is governed by the Federal Rules of Criminal Procedure." *Id.* Although the statute does not delimit the duration of the injunction, courts have suggested that the restraint remains in effect until the outcome of the related criminal case. *DBB, Inc.*, 180 F.3d at 1284; *accord United States v. Fang*, 937 F. Supp. 1186, 1202 (D. Md. 1996) ("If within a

reasonable period of time [after an injunction is entered under section 1345], the Government should fail to go forward with criminal charges, the entire fund may be subject to release from the freeze order.").

By contrast, 21 U.S.C. § 853, the criminal forfeiture statute addressed by this Court in *Kaley*, *Monsanto* and *Caplin & Drysdale, Chtd.*, does not explicitly provide for a post-indictment hearing. Nor does it contain language explicitly authorizing the restraint of "property of equivalent value," "substitute assets," or "untainted assets." Nevertheless, the government has urged courts to construe section 853 to permit the restraint of untainted assets, and the circuit courts have divided on that question of statutory construction.[1] The one circuit that has adopted the government's construction of section 853 as authorizing the pretrial restraint of untainted, substitute assets has nevertheless held that the restraint

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[1] The circuit courts are divided as to whether the statutory language of the criminal forfeiture statutes, 21 U.S.C. § 853 and 18 U.S.C. § 1963, which are virtually identical, authorize the pretrial restraint of untainted, substitute assets. *Compare In re Billman*, 915 F.2d 916, 921 (4th Cir. 1990) (statute construed to authorize restraint of substitute assets) *with United States v. Parrett*, 530 F.3d 422, 430-31 (6th Cir. 2008) (statute construed to not authorize restraint of substitute assets); *United States v. Gotti*, 155 F.3d 144, 149 (2d Cir. 1998) (same); *United States v. Field*, 62 F.3d 246, 248-49 (8th Cir. 1995) (same); *United States v. Ripinsky*, 20 F.3d 359, 363 (9th Cir. 1994) (same); *In re Martin*, 1 F.3d 1351, 1355-56 (3d Cir. 1993) (same); *United States v. Floyd*, 992 F.2d 498, 500-02 (5th Cir. 1993) (same). The Eleventh Circuit has not addressed this statutory construction question.

of a defendant's "wholly legitimate funds to hire the attorney of his choice" would violate the Sixth Amendment, so a hearing is required "to provide an opportunity for [the defendant] to prove that the government seized untainted assets without probable cause and that he needs those same assets to hire counsel." *United States v. Farmer*, 274 F.3d 800, 804-06 (4th Cir. 2001).[2]

C. Course of Proceedings and Relevant Facts

Petitioner was in the health care business, providing nursing and therapy services to home-bound patients. On October 2, 2012, the government filed a Civil Complaint and an Emergency Ex Parte Motion for Temporary Restraining Order and Preliminary Injunction under 18 U.S.C. § 1345, alleging that petitioner defrauded Medicare by paying kickbacks for patient referrals and billing Medicare for unnecessary services. App. 8, 12-13.

The government asked the district court to freeze up to $45 million of petitioner's assets – representing all of the Medicare revenue – "to preserve the status quo and ensure that sufficient assets are available to satisfy any judgment requiring restitution or forfeiture." DE1:8, 17; DE4:2. In support, the government

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[2] In *Farmer*, 274 F.3d at 801, the government invoked 18 U.S.C. § 982 as the statutory authority for the seizures of the defendant's assets. 18 U.S.C. § 982(b)(1) provides that forfeitures and seizures are governed by the procedures set forth in 21 U.S.C. § 853.

filed a sealed declaration from an FBI agent summarizing unsworn hearsay information from unidentified confidential informants. App. 12-14.

Without notice to petitioner or an opportunity to be heard, Judge Huck entered an ex parte Temporary Restraining Order ("ex parte TRO") prohibiting petitioner from disposing of any assets "that are proceeds from [petitioner's] Federal health care offenses or property of an equivalent value of such proceeds or profits," including but not limited to forty bank accounts and sixteen parcels of property. App. 8, 12. On the same date, a federal grand jury returned an Indictment against petitioner that tracked the allegations of the civil complaint. The Indictment invoked 18 U.S.C. § 982 and 21 U.S.C. § 853 to seek forfeiture of assets traceable to the crimes charged, as well as substitute assets. However, the government did not seek a restraining order under section 853(e), having already obtained the ex parte TRO in the parallel civil proceeding under section 1345. The government arrested petitioner and served her with a copy of the civil action.

In the civil case before Judge Huck, petitioner filed a Motion to Modify the Restraining Order to Release Assets for the Defense of the Related Criminal Case, so that petitioner could retain counsel to defend her, no small task given the volume of discovery (750 banker boxes of documents) related to over 1,900 Medicare patients, over 1,000 private pay/insurance patients, over 200 prescribing doctors, over 400 nurses/therapists/home health aides, and more than 20

laboratories that performed blood testing. DE58:2; DE8-9. As the government and Judge Huck acknowledged, petitioner's net worth was far less than $45 million, so the ex parte TRO effectively prohibited her from spending any funds for her defense. App. 12. Petitioner proffered that she owned untainted assets, not traceable to Medicare revenue, and argued that a court order prohibiting her from using her untainted assets for her criminal defense categorically violated the Fifth and Sixth Amendments:

> Defendant Luis submits that the Fifth and Sixth Amendments, individually and in combination, require that the court exempt from restraint and forfeiture those assets needed for (and ultimately expended on) her legal defense to the charges pending before Judge Cooke. By freezing even a defendant's untainted assets before trial, the government not only "cripple[s] a defendant's ability to retain [private] counsel," but also takes from her the funds she would otherwise invest in her defense for the best and most industrious investigators, experts, paralegals, and law clerks, to at least attempt to match the litigation support available to the United States Attorney's Office.

DE46:13-14 (citations and quotations omitted); *see* App. 29.

Judge Huck convened a hearing pursuant to section 1345(b). The government proceeded exclusively on a "kickback" theory, expressly eschewing reliance on the theory that Medicare was billed for unnecessary

services. DE67:12-19; DE71:6-7; DE87:13-21. Judge Huck accepted the FBI agent's written declarations as the direct testimony. Those declarations summarized the unsworn hearsay and double hearsay from unnamed confidential informants who claimed that they had been paid kickbacks.

Petitioner requested a "full adversarial hearing where she should be allowed to cross-examine the [confidential informants]." App. 16. Judge Huck refused, concerned that "[t]his type of extensive hearing would be tantamount to requiring the Government to preview its entire case." App. 20. Instead, Judge Huck permitted defense counsel to cross-examine the FBI agent. The cross-examination revealed that the confidential informants had themselves engaged in other criminal activity, had significant credibility issues, and were cooperating with the government in exchange for leniency. Apart from summarizing the unsworn debriefings of the confidential informants and bank account information, the FBI agent had no personal knowledge of the facts. He reported that the health care companies received gross proceeds from Medicare approximating $45 million, of which petitioner retained approximately $4.5 million (after paying operating costs). App. 14. As for the total dollar value of kickbacks paid, the FBI agent was not specific, testifying only that petitioner and her codefendants withdrew over $1 million in cash over a three year period. DE96-1:5; DE135:99.

Petitioner submitted evidence, which the government did not rebut, that her health care business

generated more than $15 million in revenues from sources other than Medicare – not covered by the civil complaint or indictment. DE135:90-91 and Defense Exhibit 2. The government and petitioner stipulated that "the [petitioner] had made a sufficient showing that the TRO may currently be restraining substitute assets that would otherwise be available to retain counsel of choice." DE135:90.[3]

D. The District Court's Published Opinion *United States v. Luis*, 966 F. Supp. 2d 1321 (S.D. Fla. June 21, 2013)

Judge Huck issued a published opinion denying petitioner's motion for release of assets to retain counsel and granting the motion for preliminary injunction in the amount of $45 million. App. 8-34. Judge Huck found that "the indictment and [the FBI Agent's] declarations establish[ed] probable cause to

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[3] In a post-hearing submission, petitioner challenged the government's entitlement to restrain $45 million of Medicare revenues paid to petitioner's companies, given that the government relied exclusively on a kickback theory. Petitioner argued that her alleged kickback scheme caused no "loss" to Medicare, so the government was not entitled to a restraining order against all the Medicare revenue. *See United States v. Medina*, 485 F.3d 1291, 1304 (11th Cir. 2007) ("There was no evidence presented that these claims were not medically necessary. Even though . . . Medicare would not pay a claim if they knew parties were receiving kickbacks, this is not sufficient to establish a loss to Medicare.").

satisfy the elements for injunctive relief under § 1345." App. 14.[4]

With regard to the constitutional issue, Judge Huck recognized that this Court had already held that the "qualified right [to counsel of choice] does not permit a criminal defendant to use assets that are the proceeds of criminal activity to retain counsel." App. 30 (emphasis added). However, Judge Huck acknowledged: "The more difficult question is the one presented here. That is, whether a criminal defendant has a Sixth Amendment right to use *untainted*, substitute assets to retain counsel of choice." App. 30

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[4] Judge Huck acknowledged that "[r]egarding the applicable burden of proof, there is considerable disagreement in the case law. Several courts have applied the preponderance of the evidence standard to claims for injunctive relief under section 1345. Other courts have concluded that a showing of only probable cause is required." App. 11 (citations omitted). Judge Huck concluded that "probable cause is the correct burden of proof," *id.*, but noted that "[e]ven under the preponderance standard, the Government has carried its burden of proof to enter an injunction restraining at least $40.5 million dollars [sic], which is 90% of $45 million. This finding is based on the indictment, as well as Special Agent Warren's affidavits. . . ." App. 15 n.3. Petitioner argued for a categorical prohibition against the restraint of untainted assets needed for counsel of choice. Alternatively, petitioner argued that the "limited hearing [did] not give the court a basis to make reliable 'findings of fact,' as the government's presentation was based on unsworn hearsay – indeed multiple hearsay in some instances – from inherently unreliable declarants." DE102:8. Petitioner argued that if a judicial finding could, in theory, suffice to restrain untainted assets, then a quantum of proof higher than mere preponderance would be required. DE102:11.

(emphasis added). Admitting that "the answer to this question is far from clear," App. 31, Judge Huck nonetheless concluded that "there is no Sixth Amendment right to use untainted, substitute assets to hire counsel." App. 32.

Judge Huck found illustrative a variation of the bank robber hypothetical from earlier cases, including *Caplin & Drysdale, Chtd.*, 491 U.S. at 626 (using a bank robbery proceeds hypothetical to explain that a defendant "has no Sixth Amendment right to spend another person's money for services rendered by an attorney. "). Judge Huck posited:

> The reason the bank robber is not permitted to use the [bank's] $100,000 to hire a lawyer is obvious. The money does not belong to him. But suppose the bank robber in the example above spent the $100,000 that he stole. It just so happens, however, that he has another $100,000 that he obtained legitimately. Should his decision to spend the $100,000 he stole mean that he is free to hire counsel with the other $100,000 when Congress has authorized restraint of those substitute assets? The reasonable answer is no. The bank has the right to have those substitute, untainted assets kept available for return as well.

App. 32.

E. The Eleventh Circuit Opinion *United States v. Luis*, 564 F. App'x 493 (11th Cir. 2014)

Petitioner appealed Judge Huck's civil injunction. The Eleventh Circuit issued a *per curiam*, unpublished opinion rejecting the constitutional claims:

> After reviewing the record, reading the parties' briefs and having the benefit of oral argument, we affirm the district court's order granting the government's motion for a preliminary injunction. The arguments made by Luis in this appeal are foreclosed by the United States Supreme Court decisions in *Kaley*; *Caplin & Drysdale Chartered; Monsanto*; and [the Eleventh Circuit's decision in] *DBB, Inc.* Accordingly, we affirm the district court's order granting the government's motion for a preliminary injunction.

App. 2-3 (citations omitted).

Petitioner sought rehearing and rehearing en banc, noting that the Eleventh Circuit had previously warned, in dicta, that restraining untainted assets needed to retain counsel would have constitutional implications:

> There is the possibility that prosecutors will seek broad, sweeping restraints recklessly or intentionally encompassing legitimate, nonindictable assets. The loss of such legitimate assets would improperly cripple a defendant's ability to retain counsel.
>
> * * *

> If the defendant proves at trial or in a collateral proceeding that prosecutors, acting in bad faith, restrained assets which they knew or should have known to have no connection with criminal activity, a conviction would be in great jeopardy due to a denial of the Sixth Amendment right to counsel of choice.

United States v. Bissell, 866 F.2d 1343, 1355 (11th Cir. 1989) (addressing the restraint of tainted assets under 21 U.S.C. § 853). Rehearing was denied on July 9, 2014. App. 35-36.

At the request of petitioner and the government, Judge Cooke stayed the parallel criminal proceedings pending the outcome of this petition for a writ of certiorari, as petitioner is prohibited by court order from spending her untainted assets to retain counsel in the criminal case.[5]

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[5] Petitioner is not in custody, having been admitted to pretrial release by Judge Cooke. There are no other defendants awaiting trial in the criminal case.

REASONS FOR ISSUING THE WRIT

A. The United States Court of Appeals for the Eleventh Circuit Has Decided an Important Question of Federal Law That Has Not Been, but Should Be, Settled by This Court

The restraint of untainted assets needed to retain counsel poses a serious threat to the constitutional right to counsel of choice and the balance of forces in a criminal case. A statute that dispossesses a presumptively innocent defendant of her untainted assets before trial – denying her the financial ability to retain counsel – should be of great concern to this Court.

This Court has previously addressed the constitutionality of restraining and forfeiting *tainted* assets earmarked for attorneys' fees. In the context of 21 U.S.C. § 853, *Caplin & Drysdale, Chtd.* rejected a Sixth Amendment challenge to the forfeiture of drug proceeds paid to a criminal defense attorney, reasoning that under the "relation-back" doctrine of the forfeiture statutes, the government has a vested property interest in tainted property upon commission of the act giving rise to forfeiture. 491 U.S. at 627. The Court reasoned that "[w]hatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond 'the individual's right to spend his own money to obtain the advice and assistance of counsel.'" *Id.* at 626 (emphasis added) (citation

omitted). This "taint theory" has "long been recognized in forfeiture cases." *Id.* at 627 (citation omitted).

Based on the same reasoning, *Monsanto* upheld the pretrial restraint of *tainted* assets under 21 U.S.C. § 853(e) against a Sixth Amendment challenge. *Monsanto*, 491 U.S. at 616.

And just Last Term, *Kaley* held that when the government restrains *tainted* assets needed to retain counsel of choice under section 853(e), the Fifth and Sixth Amendments do not require that a defendant be afforded a pretrial hearing to challenge the grand jury's finding of probable cause. *Kaley*, 134 S. Ct. at 1100-05.

These cases all involved tainted assets that were allegedly traceable to, or the instrumentalities of, a crime. *See, e.g., Caplin & Drysdale, Chtd.*, 491 U.S. at 629 (describing "ill-gotten gains" and "profits of crime" as forfeitable); *Monsanto*, 491 U.S. at 602 (noting that the indictment alleged that the assets subject to forfeiture "had been accumulated by respondent as a result of his narcotics trafficking"); *Kaley*, 134 S. Ct. at 1095 (noting that "no one contests that the assets in question derive from, or were used in committing, the offenses"). This circumstance animated the Court's decisions. *See Caplin & Drysdale, Chtd.*, 491 U.S. at 626 (using a bank robbery proceeds hypothetical to explain that a defendant "has no Sixth Amendment right to spend another person's money for services rendered by an attorney. ");

Kaley, 134 S. Ct. at 1096-97 (recalling the bank robbery proceeds hypothetical to hold that *Caplin & Drysdale, Chtd.* "cast the die" on the Kaleys' constitutional challenge). No aspect of the Court's holdings in *Caplin & Drysdale, Chtd.*, *Monsanto*, or *Kaley* suggested that the pretrial restraint of *untainted* assets would meet a similar fate.

This Court has held that the restraint of tainted assets does not offend the Sixth Amendment because under the relation-back doctrine proceeds traceable to the offense do not belong to the defendant in the first place. *Caplin & Drysdale, Chtd.*, 491 U.S. at 627. The government's right to property traceable to the crime vests upon the commission of the crime, even if title is not perfected until judgment. *United States v. A Parcel of Land (92 Buena Vista Avenue)*, 507 U.S. 111, 126 (1993).

By contrast, as other circuits have recognized, the relation-back doctrine does not apply to untainted assets, either as a matter of statutory construction or common law. *See, e.g., United States v. Erpenbeck*, 682 F.3d 472, 477-78 (6th Cir. 2012); *United States v. Jarvis*, 499 F.3d 1196, 1204 (10th Cir. 2007). Unlike tainted assets, untainted, substitute assets are owned by the defendant irrespective of the crime and, by definition, are not criminal proceeds. The government possesses no property right in a defendant's untainted assets prior to trial.

The law and our nation's history recognize a constitutionally significant distinction between tainted and untainted assets. In England, three kinds of forfeiture had been established when the Sixth Amendment was ratified in the United States: 1) deodand, 2) forfeiture upon conviction for a felony or treason, and 3) statutory forfeiture. *See generally Austin v. United States*, 509 U.S. 602, 612-13 (1993). Deodand (not relevant to this case) reflected the view that the value of an object "causing the accidental death of a King's subject was forfeited to the Crown." *Id.* at 611 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-81 (1974)). Forfeiture upon conviction for a felony or treason (*i.e.*, *in personam* forfeiture) was a forfeiture of estate, which served to punish felons and traitors for violating society's laws. Statutory forfeiture sought to forfeit objects used in violation of the customs and revenue laws (*i.e.*, *in rem* forfeitures). *Austin*, 509 U.S. at 612.

"Of England's three kinds of forfeiture, only the third took hold in the United States." *Id.* at 613. That is, the only forfeiture recognized by "the common law courts in the Colonies – and later in the states during the period of Confederation" – was *in rem* forfeiture, based on the fiction that the property itself is guilty of the crime and thereby tainted. *Id.*; *see also 92 Buena Vista Avenue*, 507 U.S. at 121 ("In all of these early cases the Government's right to take possession of property stemmed from the misuse of the property itself.").

The Founding Fathers so disdained *in personam* "forfeiture of estate" penalties that they banned them in the Constitution for the crime of treason. *See* U.S. Const., art. III, § 3, cl. 2. "The First Congress [in 1790] explicitly rejected *in personam* forfeitures as punishments for federal crimes, and Congress reenacted this ban several times over the course of two centuries." *United States v. Bajakajian*, 524 U.S. 321, 328 n.7 (1998) (citation omitted). It was not until 1970 that Congress resuscitated the *in personam* forfeiture penalty for organized crime and major drug trafficking; not until 1984 that these laws authorized ex parte pretrial restraining orders (*e.g.*, 21 U.S.C. § 853(e)); not until 1986 that the laws authorized the forfeiture of substitute assets upon the satisfaction of certain conditions, 21 U.S.C. § 853(p); and not until 1996 that Congress authorized forfeitures for health care fraud offenses (18 U.S.C. § 982(a)(7)).

The notion that a court, upon request of the government, would enjoin a presumptively innocent accused from using her own legitimately-earned assets to retain counsel – so that these untainted, substitute assets would be available to the government as an *in personam* penalty upon conviction – would have been inconceivable to the Founding Fathers. After all, at the time the Sixth Amendment was ratified, the right to appointed counsel had not yet been recognized as fundamental in all criminal cases. *See generally Gideon v. Wainwright*, 372 U.S. 335 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942)). In those days, the only lawyer available to a criminal defendant

was the lawyer who the defendant could afford to retain.

Moreover, criminal forfeiture is a form of punishment. *United States v. Bajakajian*, 524 U.S. at 328. A criminal defendant's present interest in her untainted assets for purposes of retaining counsel far outweighs the government's contingent future interest in confiscating those assets as a punishment, even if to satisfy a possible restitution order in the event of conviction.

> And we are not talking about [unfreezing] all of a defendant's assets that are subject to forfeiture – only those that the defendant can show are necessary to secure [her] counsel of choice a discrete portion of the assets the Government seeks. The statistics cited by the Court on the total amount of assets recovered by the Government and provided as restitution for victims, [*Kaley*, 134 S. Ct.] at 1094, n. 1, are completely beside the point.

Kaley, 134 S. Ct. at 1113 (Roberts, C.J., dissenting). The government's financial interest in the untainted funds needed for a legal defense must yield to the constitutional rights of the accused.

The government's position in the court below – that untainted assets needed to retain counsel may be restrained – is an about-face. The Solicitor General conceded at the October 2013 oral argument in *Kaley* that a defendant has a constitutional right to a hearing on whether property restrained under 21 U.S.C. § 853 is traceable or related to the crime charged in

the indictment. *Kaley*, 134 S. Ct. at 1095 n.3 ("At oral argument, the Government agreed that a defendant has a constitutional right to a hearing on that question."). And the government has uniformly maintained that, as a matter of statutory construction, 21 U.S.C. § 853(e) authorizes the pretrial restraint of substitute assets.[6] *E.g.*, *In re Billman*, 915 F.2d at 921. So the government's concession at the *Kaley* oral argument "that due process guarantees defendants a hearing to contest the traceability of the restrained assets to the charged conduct," *Kaley*, 134 S. Ct. at 1111 (Roberts, C.J., dissenting), must mean that if the government is unable to trace the assets to the alleged crime, then the Constitution forbids the continued restraint of the (untainted) assets, at least in an amount sufficient to allow the defendant to retain her counsel of choice.

This Court "[did] not opine on the matter." *Kaley*, 134 S. Ct. at 1095 n.3.[7] However, Chief Justice Roberts,

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[6] As previously noted, *supra* note 1, the circuit courts are divided as to whether the statutory language of the criminal forfeiture statutes, 21 U.S.C. § 853 and 18 U.S.C. § 1963, which are virtually identical, authorize the pretrial restraint of untainted, substitute assets.

[7] This Court did observe that even though section 853 does not provide for a post-indictment hearing, lower courts "have uniformly allowed the defendant to litigate [in a pretrial hearing] whether probable cause exists to believe that the assets in dispute are traceable or otherwise sufficiently related to the crime charged in the indictment." *Kaley*, 134 S. Ct. at 1095. Those lower courts that construe section 853 as not authorizing the restraint of substitute assets, *see supra* note 1, have granted

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joined in dissent by Justices Sotomayor and Breyer, expressed agreement that the Constitution requires tracing the restrained asset to the charged crime. *Kaley*, 134 S. Ct. at 1108 & n.2 (Roberts, C.J., dissenting) ("Neither the Government nor the majority gives any reason why the District Court may reconsider the grand jury's probable cause finding as to traceability – and in fact constitutionally must, if asked – but may not do so as to the underlying charged offenses."). Presumably that suggests that at least three Justices share the view that if the government fails to trace an asset to the charged crime, then the Constitution commands the release of that untainted asset when needed to retain counsel in a criminal case.

Of course, it is now well settled that the erroneous deprivation of the right to "be defended by the counsel he believes to be the best" is per se reversible, because it affects "the framework within which the trial proceeds." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146, 148-50 (2006). As the Chief Justice explained, the adversary system of justice depends upon confidence in "an independent bar as a check

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these traceability hearings to insure that the government is not restraining *any* untainted assets, because untainted assets are beyond the reach of the statute in those circuits. In the one circuit that has construed section 853 as authorizing the restraint of untainted assets, courts have required traceability hearings to protect the defendant's right to counsel of choice under the Sixth Amendment, limiting the release of untainted assets to only so much as is needed for legal expenses. *Farmer*, 274 F.3d at 804-06. *See post* at 25-27.

on prosecutorial abuse and government overreaching. Granting the Government the power to take away a defendant's chosen advocate strikes at the heart of that significant role." *Kaley*, 134 S. Ct. at 1114-15 (Roberts, C.J., dissenting). To the extent that the *Kaley* "decision erode[d] that confidence by permitting the Government to deprive a criminal defendant of his right to counsel of choice" through a freeze of *tainted* assets, *id.* at 1114, then surely the Eleventh Circuit's decision upholding the restraint of *untainted* assets needed for counsel of choice has further eroded, if not decimated, whatever confidence remained after *Kaley*.

B. The United States Court of Appeals for the Eleventh Circuit Has Entered a Decision in Conflict With the Decision of Another United States Court of Appeals on the Same Important Matter

The Eleventh Circuit held that a pretrial restraint under 18 U.S.C. § 1345 of untainted, substitute assets needed to retain private counsel in a criminal case does not violate either the Fifth or Sixth Amendments. That holding creates a conflict between circuits on a question of constitutional law.

In the Fourth Circuit, where untainted, substitute assets are subject to pretrial restraint, under 21 U.S.C. § 853, *see In re Billman*, 915 F.2d at 921, the Court of Appeals has held that the Sixth Amendment prohibits the restraint, to the extent that substitute assets are needed to retain counsel:

> While there is no Sixth Amendment right for a defendant to obtain counsel using tainted funds, [*the defendant*] *still possesses a qualified Sixth Amendment right to use wholly legitimate funds to hire the attorney of his choice.*
>
> * * *
>
> When assets are seized pursuant to civil forfeiture, the hearing right applies only insofar as the civil seizures affect a defendant's right to select his counsel of choice in a related criminal case, not in the civil forfeiture case itself. And the hearing is certainly not the forum to reach a definitive conclusion on the legality of each asset seized. Instead, a brief hearing will provide *an opportunity for* [*the defendant*] *to prove by a preponderance of the evidence that the government seized untainted assets without probable cause and that he needs those same assets to hire counsel.* The government for its part may present evidence that [the defendant] has other substantial assets with which to hire attorneys and/or evidence of probable cause to believe that the seized assets are tainted and forfeitable.

United States v. Farmer, 274 F.3d 800, 804-06 (4th Cir. 2001) (emphasis added, citations omitted);[8]

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[8] Before *Farmer* was decided, the Fourth Circuit in *In re Billman*, 915 F.2d at 920-22, had upheld the pretrial restraint of substitute assets under the RICO forfeiture statute, 18 U.S.C. § 1963, against both a statutory and constitutional challenge.

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accord United States v. Najjar, 57 F. Supp. 2d 205, 209-10 (D. Md. 1999) (modifying restraining order to exempt substitute asset because the defendant's "Sixth Amendment right to counsel is simply more important than the Government's interest in the untainted portion of Defendant's substitute property"); *contra United States v. Wingerter*, 369 F. Supp. 2d 799 (E.D. Va. 2005) ("[T]he key distinction for determining whether pretrial restraint of property violates a defendant's Sixth Amendment right is not whether the property is *tainted* or *untainted*, but rather whether it is *forfeitable* or *nonforfeitable*. Thus, all forfeitable property, including substitute property, may be restrained pretrial without violating a defendant's Sixth Amendment right; it is nonforfeitable

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However, *In re Billman* dealt with a defendant who proposed to pay her counsel not with her own assets, but with the assets fraudulently conveyed to her by her fugitive co-defendant, without consideration. Given that she "did not qualify as a bona fide purchaser for value," the Fourth Circuit rejected her Sixth Amendment claim to use her co-defendant's substitute assets to pay her counsel of choice. *Id.* at 921-22. *In re Billman* did not address a defendant's right to use her *own* substitute assets to retain counsel of choice. Logically, if *In re Billman* stood for the proposition that the restraint of a defendant's *own* untainted assets needed to pay counsel of choice comported with the Sixth Amendment, then *Farmer* would have held that no tracing hearing was required. Instead, as quoted in the accompanying text, the Fourth Circuit, after *In re Billman*, held that the Sixth Amendment required a tracing hearing to "provide an opportunity for Farmer to prove by a preponderance of the evidence that the government seized untainted assets without probable cause and that he need[ed] those same assets to hire counsel." *Farmer*, 274 F.3d at 804.

property that may not be restrained"); *see generally United States v. Patel*, 888 F. Supp. 2d 760, 767-70 (W.D. Va. 2012) (canvassing the case law but not deciding the constitutional question).

In the analogous context of securities fraud cases, a number of district courts have concluded that the Fifth and/or Sixth Amendments prohibit the restraint of untainted assets needed to retain counsel in a parallel criminal case:

> [The criminal defendant] has demonstrated – and the Commission does not dispute – that without advancement of the frozen funds, she will be unable to pay defense counsel's fees in the criminal action. Under such circumstances, the Commission is required to demonstrate that the frozen funds are traceable to fraud.
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> * * *
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> Were [the criminal defendant] seeking to use frozen funds to pay her defense costs in a civil action, the fact that potential disgorgement in this case exceeds the amount of money that has been frozen might be sufficient to prevent this Court from releasing the funds. However, [the criminal defendant] seeks advancement of fees and expenses only in the criminal action against her. While [the criminal defendant] may not be advanced frozen funds traceable to the fraud she helped to perpetrate, there has been no showing that all of the funds currently restrained are traceable to fraud.

SEC v. FTC Capital Markets, Inc., No. 09 Civ. 4755 (PGG), 2010 WL 2652405, at *7 (S.D.N.Y. June 30, 2010).

> Although a court may impose an asset freeze in a civil case, notwithstanding a companion criminal case, these circumstances dictate that the court pay particular attention to the defendant's Fifth and Sixth Amendment rights.
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> * * *
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> Accordingly, in light of the fact that my order freezing [the criminal defendant's] personal assets may hinder his ability to obtain counsel of choice in the related criminal case, I conclude that that order may not be continued through trial in the absence of an adversary hearing as to whether the SEC has made a showing that the frozen assets are traceable to fraud.

SEC v. Coates, No. 94 Civ. 5361 (KMW), 1994 WL 455558, at *3 (S.D.N.Y. Aug. 23, 1994); *accord SEC v. McGinn*, No. 10-CV-457, 2012 WL 1142516 (N.D.N.Y. Apr. 12, 2012).

C. This Case Presents a Suitable Vehicle for the Court to Resolve this Important Constitutional Issue That Has Divided the Lower Courts

The procedural posture of this case and the record below make this case an appropriate candidate for resolving the constitutionality of restraining

untainted assets needed to retain counsel in a criminal case.

1. The fact pattern and procedural history are straightforward. Petitioner is indicted for allegedly defrauding the government of $45 million. The government has obtained an injunction that restrains all of petitioner's assets, including untainted assets that would otherwise be available for her defense in the criminal case. Thus, petitioner is enjoined by court order from exercising her constitutional rights to retain counsel and fund her criminal defense.

2. The constitutional issue is properly framed. The statute under review explicitly authorizes district courts to restrain property traceable to the alleged fraud, as well as "property of equivalent value." 18 U.S.C. § 1345(a)(2)(B)(i). In the district court and in the court of appeals, petitioner challenged the constitutionality of the restraint of that much of her "property of equivalent value" (*i.e.*, her untainted assets) needed to retain counsel and fund her criminal defense. The issues have been preserved for review by this Court.

3. Although unpublished and only "persuasive authority," *see* 11th Cir. R. 36-2, the Eleventh Circuit's decision affirming Judge Huck's published opinion will have de facto precedential value and long-lasting implications. It will embolden prosecutors to more aggressively target legitimate assets for restraint, often through ex parte proceedings, and "stack the deck in the government's favor by crippling

the defendant's ability to afford high-quality counsel." *United States v. Kaley*, 579 F.3d 1246, 1267 (11th Cir. 2009) (Tjoflat, J., concurring).

For many defendants – including innocent ones – the restraint will make it difficult, if not impossible, to retain any private counsel at all. With "persuasive authority" weighing against them and thus the prospect of payment bleak, who among the criminal defense bar will, in the future, invest the time and resources to shepherd an asset-restraint case through the trial and appellate courts? From arrest through appeal, this case has taken nearly two years to litigate. At least petitioner has been represented, up to now, by her counsel of choice, who has challenged the restraint since her arrest and has teed up the constitutional issue for this Court's consideration.[9]

4. The restraint and forfeiture of attorneys' fees is a matter of immediate concern not only to defendants, but to the defense bar, as well. The Southern District of Florida, in particular, has been at the front line in the legal battle over attorneys' fees in criminal cases.

Kaley itself arose out of a prosecution in the Southern District of Florida, a case in which "the Government was pitching a fraud without a victim,

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[9] Coincidentally, petitioner's counsel of choice was counsel of record in *Kaley*, so counsel had familiarity with the legal issue when undertaking the representation in the courts below.

because no Government witness took the stand [in the co-defendant's case] to claim ownership of the allegedly stolen devices." 134 S. Ct. at 1107 (Roberts, C.J., dissenting). Even after the defendants exposed that "the theory of prosecution [was] legally defective," *id.* at 1113, the government did not relent, taking full advantage of its power to restrain assets needed for defense counsel to challenge arguably bogus charges. After this Court affirmed the lower court's order restraining assets, the Kaleys were unable to retain counsel of choice and are now set for trial in November 2014, represented by other attorneys. *United States v. Kaley*, Case No. 07-CR-80021-DPG (S.D. Fla. July 25, 2014) (DE309).

In the case of Manuel Noriega, who was charged with various narcotics-related offenses in the Southern District of Florida, the government effected the restraint and/or seizure of millions of dollars of assets, leaving the "former de facto ruler of Panama" without funds to retain counsel. *United States v. Noriega*, 746 F. Supp. 1541, 1542 (1990). It was unclear to the district court whether "any efforts were made [by the government] to differentiate between assets and properties allegedly tainted by illegal drug activities and those acquired by other means." *Id.* at 1546. Over the government's objection, the district court ruled that only tainted assets could be restrained, ordering that untainted "property [would] be cleared of restraint." *Id.* The district court reasoned:

> The Court fails to see what possible government interest justifies its freezing of Defendant's assets without setting forth any basis for its allegations that the assets are tainted by illegal activity. The danger that an innocent person may be convicted because of the unfair deprivation of assets that would have been used to retain his counsel of choice is simply too great to permit a freeze to go unchallenged.
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> * * *
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> In short, the Court finds that where a criminal defendant's only assets available for payment of attorneys' fees have been placed out of reach by government action, due process mandates that the government be required to demonstrate the likelihood that the restrained assets are connected to illegal activity.

Id. at 1544-46.

In *United States v. Abbell,* two defense lawyers were indicted in the Southern District of Florida for money laundering, 18 U.S.C. § 1956, in relation to their receipt of funds from a client, a reputed drug lord residing in Colombia.

> [E]vidence showed that [the client] owned a wide variety of "legitimate" businesses, including a chain of pharmacies, grocery stores, construction companies, and a soccer team from which [the client] could have paid [the lawyers]. [The Eleventh Circuit] accept[ed] that [the client]'s businesses produced

> some amount of cash flow from which the funds used in transactions underlying this case might have been derived.

271 F.3d 1286, 1295 (11th Cir. 2001). Nevertheless, the Eleventh Circuit upheld their convictions based on "a finding that [the client]'s illegal and legal moneys – to the extent legal moneys existed – were commingled, thus tainting all funds originating from [the client]." *Id.* The government's aggressive stance in *Abbell*, buoyed by the Eleventh Circuit's affirmance, sent a strong word of caution to the private defense bar: Careful when accepting even *untainted* funds from your client.

Thereafter, in *United States v. Velez*, 586 F.3d 875 (11th Cir. 2009), also prosecuted in the Southern District of Florida, the government pursued money laundering charges against two attorneys and a certified public accountant who, in the wake of *Abbell*, had been hired by a law firm to vet the source of fees for the defense of a client awaiting trial for narcotics trafficking. The indictment alleged that the funds were tainted after all, so the corresponding monetary transactions – undisputedly for the payment of legal fees – violated 18 U.S.C. § 1957. *Velez*, 586 F.3d at 876.

The government was not dissuaded by the plain language of the statute, which excludes from its scope "any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution," 18 U.S.C. § 1957(f)(1), resurrecting the same "flawed" analysis that had been

rejected years earlier in a published district court opinion. *United States v. Ferguson*, 142 F. Supp. 2d 1350, 1357-58 (S.D. Fla. 2000) ("If § 1957 were construed in the manner that the United States urges, the exception for transactions necessary to protect an individual's Sixth Amendment rights would amount to no exception, at all.").[10]

The district court granted defendants' motion to dismiss, *United States v. Velez*, Case No. 05-CR-20770-MGC, 2008 WL 5381394 (S.D. Fla. 2008), and the Eleventh Circuit affirmed, holding that "the district court was eminently correct [] that Defendants are not subject to criminal prosecution under § 1957(a), because the plain language of § 1957(f)(1) *clearly* exempts criminally derived proceeds used to secure legal representation to which an accused is

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[10] The government was also not deterred by case law from other circuits likewise observing that "the exception appears to have been inserted to prevent the broad reach of the statute from criminalizing a defendant's bona fide payment to her attorney." *United States v. Hoogenboom*, 209 F.3d 665, 669 (7th Cir. 2000) ("Correctly read, the statute offers a defense where a defendant engages in a transaction underlying a money laundering charge with the present intent of exercising Sixth Amendment rights.") (citing *United States v. Rutgard*, 116 F.3d 1270, 1291 (9th Cir. 1997)). Nor did the government heed the dicta from a case within the Eleventh Circuit. *See United States v. Elso*, 422 F.3d 1305, 1309, n.6 (11th Cir. 2005) (acknowledging that "subsection 1957(f) exempts from the definition of 'monetary transaction' 'any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution,'" but declining to extend the exemption to money laundering prosecutions under section 1956).

entitled under the Sixth Amendment." *Velez*, 586 F.3d at 879 (emphasis added). On remand, the government finally abandoned the prosecution. *United States v. Velez*, Case No. 05-CR-20770-MGC (S.D. Fla. Nov. 25, 2009) (DE305) (order granting government's motion to dismiss).

After *Velez*, the government invoked the statute at issue in this case, 18 U.S.C. § 1345, to prevent defense counsel from receiving untainted assets as attorneys fees in a Medicare fraud prosecution. *United States v. American Therapeutic Corp.*, 797 F. Supp. 2d 1289 (S.D. Fla. 2011). The government sought an injunction in the Southern District of Florida against all assets of a defendant, tainted and untainted. In a published opinion, the district court upheld the government's proposed restraint, quoting *Caplin & Drysdale, Chtd.* for the proposition that "the Government does not violate the Sixth Amendment if it seizes . . [ill-gotten gains] and refuses to permit the defendant to use them to pay for his defense." *Id.* at 1294 (brackets in original). Of course, untainted assets are, by definition, not "ill-gotten gains," so the *American Therapeutic Corp.* court erroneously conflated tainted and untainted assets in reaching its decision.

The Eleventh Circuit has made the same mistake in petitioner's case in rejecting the constitutional challenge to the restraint of untainted assets. App. 1-3. Worse yet, its pronouncement that "[t]he arguments made by [petitioner] Luis in this appeal are *foreclosed* by the United States Supreme Court decisions in *Kaley*, *Caplin & Drysdale, Chartered*, and

Monsanto," App. 3 (emphasis added, citations omitted), suggests to the defense bar that the constitutional question has been decided by this Court and any further argument on the subject would be futile, if not frivolous.

To the extent that the constitutional question is not "foreclosed," this Court should say so. Ordinarily, this Court might let an issue "percolate" further in the circuits before resolving it. But this is no ordinary issue. At stake is the right to counsel of choice, the balance of forces in the courtroom, and the public's confidence in the administration of justice. *See Kaley*, 134 S. Ct. at 1114 (Roberts, C.J., dissenting). Allowing the conflict to fester could potentially infect numerous convictions in the future, given that the erroneous denial of counsel of choice is structural error. *Gonzalez-Lopez*, 548 U.S. at 146, 148-50. A clear and prompt directive from this Court is appropriate.

5. At the request of petitioner and the government, Judge Cooke has stayed the criminal case pending the outcome of this petition – rather than force upon petitioner an appointed lawyer to spend months digesting the 750 banker boxes of discovery documents related to thousands of patients, hundreds of doctors, nurses, therapists, and aides and otherwise preparing for a trial that the government estimates will last 15 days. The constitutional question is best resolved now, once and for all, before the government, the court and appointed counsel expend

resources in a lengthy criminal case, in which the accused is being denied her counsel of choice.[11]

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[11] Admittedly, this Court "generally await[s] final judgment in the lower courts before exercising . . . certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). "Cases presenting the question at issue here, however, typically arise in an interlocutory posture, since orders relating to the restraint of assets are treated as orders 'granting, continuing, modifying, refusing, or dissolving injunctions' for purposes of 28 U.S.C. 1292(a)(1)." Brief for the United States in Response to the Petition for a Writ of Certiorari in *Kaley v. United States*, No. 12-464, at 23-24 (favoring the grant of certiorari, in part because "the question presented could significantly affect the way that the remainder of the proceedings below are conducted. . . ."). This case is a hybrid, as the restraint of untainted assets was ordered by Judge Huck in the civil case, which is now closed, DE145 ("case closed for administrative purposes"); yet the impact on the constitutional rights of petitioner will be felt in the criminal case still pending before Judge Cooke.

CONCLUSION

A court order prohibiting a citizen from spending her own legitimate assets to defend herself in a criminal case would have been unimaginable to the Framers. It is unconstitutional. The Fourth Circuit agrees. The Eleventh Circuit does not. The writ should issue.

Respectfully submitted,

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October 7, 2014

United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Sila LUIS, Defendant-Appellant,
Elsa Ruiz, et al., Defendants.
No. 13-13719. | May 1, 2014.

Attorneys and Law Firms

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Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 1:12-cv-23588-PCH.

Before MARTIN, DUBINA, and SENTELLE,* Circuit Judges.

Opinion

PER CURIAM.

A federal grand jury in the Southern District of Florida indicted Appellant Sila Luis ("Luis") for her

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* Honorable David Bryan Sentelle, United States Circuit Judge for the District of Columbia Circuit sitting by designation.

role in an alleged Medicare fraud scheme that included kickbacks paid to patients who enrolled with her home healthcare companies. In addition to charging Luis with substantive offenses, the indictment included forfeiture allegations pursuant to the general criminal forfeiture statute. 18 U.S.C. § 982. The government brought this civil action to restrain Luis's assets, including substitute property of an equivalent value to that actually traceable to the scheme, before her criminal trial.

Federal law grants district courts the authority to restrain, pretrial, the assets of those accused of certain kinds of fraud. *Id.* § 1345(a)(2). This includes the authority to restrain "property of equivalent value" to that actually traceable to the alleged fraud. *Id.* § 1345(a)(2)(B)(i). Among the enumerated offenses is a "Federal health care offense," *id.* § 1345(a)(1)(C), defined elsewhere to include conspiracy to defraud the United States and to commit an offense against it, in violation of 18 U.S.C. § 371, and conspiracy to commit healthcare fraud, in violation of 18 U.S.C. § 1349. *Id.* § 24(a)(2).

In this separate civil case, the government moved to restrain Luis's assets pretrial, to include substitute assets not directly traceable to the alleged fraud. After granting a temporary restraining order, the district court held a hearing on a motion for preliminary injunction and ultimately granted the motion. Luis appeals that order, arguing she needs her funds to pay her criminal defense lawyer and that restraining those funds pretrial violates her constitutional rights.

Though we generally review a district court's grant of a preliminary injunction for abuse of discretion, we review questions of law, such as a statute's constitutionality and whether a preliminary injunction violates an individual's constitutional rights, *de novo*. *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1273 (11th Cir.2013).

After reviewing the record, reading the parties' briefs and having the benefit of oral argument, we affirm the district court's order granting the government's motion for a preliminary injunction. The district court conducted an evidentiary hearing where it heard arguments and testimony and found, based on the hearing and the indictment, that there was probable cause to believe that Luis committed an offense requiring forfeiture, that she possessed forfeitable assets, and that she was alienating those assets. The arguments made by Luis in this appeal are foreclosed by the United States Supreme Court decisions in *Kaley v. United States*, ___ U.S. ___, 134 S.Ct. 1090, 1105, 188 L.Ed.2d 46 (2014); *Caplin & Drysdale Chartered v. United States*, 491 U.S. 617, 631, 109 S.Ct. 2646, 2655, 105 L.Ed.2d 528 (1989); *United States v. Monsanto*, 491 U.S. 600, 616, 109 S.Ct. 2657, 2667, 105 L.Ed.2d 512 (1989); and *United States v. DBB, Inc.*, 180 F.3d 1277, 1283-84 (11th Cir. 1999). Accordingly, we affirm the district court's order granting the government's motion for a preliminary injunction.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-23588-CIV-HUCK/O'SULLIVAN

UNITED STATES OF AMERICA,

Plaintiff,

v.

SILA LUIS et al.,

Defendants.
_____/

PRELIMINARY INJUNCTION
AS TO DEFENDANT SILA LUIS

THIS MATTER comes before the Court upon the United States' *Ex Parte* Motion for Temporary Restraining Order and Preliminary Injunction and Supporting Memorandum of Law, pursuant to 18 U.S.C. § 1345, filed on October 2, 2012; the Complaint for Temporary Restraining Order and Preliminary and Permanent Injunction, also filed on October 2, 2012; and the Declarations of Special Agent Clint Warren. The Court entered a Temporary Restraining Order ("TRO") on October 3, 2012, and after being extended several times, it is currently effective through June 28, 2013.

For the reasons in the Court's Order issued on June 21, 2013, the Court finds that the United States has demonstrated that:

1. Defendant Luis has violated and unless enjoined could continue to violate 18 U.S.C. § 1349,

18 U.S.C. § 371, 42 U.S.C. § 1320a-7b(b)(2)(A), and/or has committed a Federal health care offense (as defined in 18 U.S.C. § 24(a)) and unless enjoined could continue to commit a Federal health care offense through the submission of false and fraudulent claims to the Medicare program; and

2. Defendant Luis has alienated or disposed of property, and unless enjoined could continue to alienate or dispose of property, obtained as a result of a Federal health care offense, property which is traceable to such violation, or property of equivalent value.

Based on the foregoing, the Court hereby concludes as follows:

That the requested relief be GRANTED and because the United States' motion is based on 18 U.S.C. § 1345, which expressly authorizes injunctive relief to protect the public interest, no specific finding of irreparable harm is necessary, no showing of the inadequacy of other remedies at law is necessary, and no balancing of the interests of the parties is required prior to the issuance of a preliminary injunction in this case.

It is therefore **ORDERED** and **ADJUDGED** that:

Defendant Sila Luis, her agents, employees, attorneys, and all persons acting in concert and participation with her, including all banking and other financial institutions at which she does business, and all corporations over which she exercises control, who receive actual or constructive notice by personal

service, by publication, or otherwise, be enjoined as follows:

1. From making or submitting or conspiring to make or submit any claims to the Medicare program or any health care benefit program, as defined in 18 U.S.C. § 24(b), in violation of 18 U.S.C. § 1349, 18 U.S.C. § 371, and/or 42 U.S.C. § 1320a-7b, and from committing any Federal health care offense, as defined in 18 U.S.C. § 24;

2. From alienating, withdrawing, transferring, removing, dissipating, or otherwise disposing of, in any manner, any moneys or sums presently deposited, or held on behalf of Defendant Luis by any financial institution, trust fund, or other financial entity, public or private, that are proceeds or profits from Defendant Luis's Federal health care offenses or property of an equivalent value of such proceeds or profits;

3. From alienating, withdrawing, transferring, removing, dissipating, or otherwise disposing of, in any manner, assets, real or personal (including, for example, real estate, motor vehicles, boats and watercraft, jewelry, artwork, antiques, household furniture and furnishings, etc.), in which Defendant Luis has an interest, up to the equivalent value of the proceeds of the Federal health care fraud ($45 million).

IT IS FURTHER ORDERED that Defendant Luis, her agents, employees, attorneys, and all persons acting in concert and participation with her, including all banking and other financial institutions at which

she does business, and all corporations over which she exercises control, are ordered:

4. To preserve all business, financial and accounting records, including bank records, that detail any of Defendants' business operations and disposition of any payment that directly or indirectly arose from the payment of money to any Defendant on behalf of the Medicare program;

5. To preserve all medical records, including patient records, that relate to any Defendants' business operations and/or to services for which claims were submitted to the Medicare program.

This Preliminary Injunction shall remain in force until further Order of the Court, provided, however, that nothing in this Preliminary Injunction shall prevent Defendant Luis from surrendering to the United States any assets frozen by this Preliminary Injunction, if the United States consents to such voluntary surrender.

DONE and ORDERED at Miami, Florida, this 24th day of June, 2013.

/s/ [Illegible]
PAUL C. HUCK
UNITED STATES
DISTRICT JUDGE

cc: Counsel of record

966 F.Supp.2d 1321
United States District Court,
S.D. Florida.

UNITED STATES of America, Plaintiff,
v.
Sila LUIS, et al., Defendants.
Case No. 12-23588-CIV. | June 21, 2013.

Attorneys and Law Firms

Susan Torres, U.S. Attorney's Office, Miami, FL, for Plaintiff.

Howard Milton Srebnick, Black Srebnick Kornspan & Stumpf, Scott Alan Srebnick, Miami, FL, for Defendants.

ORDER

PAUL C. HUCK, District Judge.

THIS MATTER is before the Court upon the United States of America (the "Government['s]") Emergency *Ex Parte* Motion for Temporary Restraining Order and Preliminary Injunction under 18 U.S.C. § 1345 [D.E. # 4] and Defendant, Sila Luis ("Luis['s]") Motion to Modify the Restraining Order to Release Assets for the Defense of the Related Criminal Case [D.E. # 46]. For the reasons discussed below, the Motion for Preliminary Injunction is granted and Luis's Motion to Modify the Restraining Order is denied.

A. Background

a. *Statutory Basis for Injunctive Relief Under 18 U.S.C. § 1345*

Section 1345 allows courts to grant injunctive relief to prevent certain types of fraud and to prevent alienation of property associated with the fraud. 18 U.S.C. § 1345. Thus, a court may enter an injunction under § 1345 preventing mail fraud, wire fraud, banking laws, or the commission of a federal health care offense.[1] *Id.* Section 1345 also allows a court to enter an injunction when an individual alienates or disposes of any property obtained as a result of such violations, to prevent any person from withdrawing, transferring, removing, dissipating, or disposing of any such property or property of equivalent value.[2]

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[1] As used in this title, the term "Federal health care offense" means a violation of, or a criminal conspiracy to violate –

(1) section 669, 1035, 1347, or 1518 of this title or section 1128B of the Social Security Act (42 U.S.C. 1320a-7b);or

(2) section 287, 371, 664, 666, 1001, 1027, 1341, 1343, 1349, or 1954 of this title section 301 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 331), or section 501 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1131), or section 411, 518, or 511 of the Employee Retirement Income Security Act of 1974, [1] if the violation or conspiracy relates to a health care benefit program.

18 U.S.C. § 24.

[2] The following is the statutory language creating the right to injunctive relief to prevent alienation of property:

(a)(2) If a person is alienating or disposing of property, or intends to alienate or dispose of property,

(Continued on following page)

Id. The "equivalent value" language means that when some of the assets that were obtained as a result of fraud cannot be located, a person's substitute, untainted assets may be restrained instead. *See United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir.1999).

b. *The Burden of Proof and Elements for Injunctive Relief Under § 1345*

As to the elements for injunctive relief, a reasonable reading of § 1345 indicates that the Government bears the burden to establish that: (1) a Federal health care offense has been committed; (2) the total amount of proceeds obtained from the criminal activity; and (3) that there has been dissipation of assets received as a result of the criminal activity. *See United States v. Brown*, 988 F.2d 658, 663 (6th Cir.1993) (finding § 1345 requires the Government demonstrate that a predicate offense has been committed and the extent of the fraud); *see also* § 1345

> obtained as a result of a [Federal health care offense] or property which is traceable to such violation, the Attorney General may commence a civil action in any Federal court –
>
> (A) to enjoin such alienation or disposition of property; or
>
> (B) for a restraining order to –
>
> (i) prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any such property or property of equivalent value . .

18 U.S.C. § 1345.

(requiring dissipation of assets for a court to award injunctive relief).

Regarding the applicable burden of proof, there is considerable disagreement in the case law. Several courts have applied the preponderance of the evidence standard to claims for injunctive relief under § 1345. *See Brown,* 988 F.2d 658, 663 (6th Cir.1993); *United States v. Williams,* 476 F.Supp.2d 1368, 1374 (M.D.Fla.2007) (applying the preponderance of the evidence standard); *United States v. Sriram,* 147 F.Supp.2d 914, 938 (N.D.Ill.2001) (same); *United States v. Barnes,* 912 F.Supp. 1187, 1198 (N.D.Iowa 1996) (same); *United States v. Quadro Corp.,* 916 F.Supp. 613, 617 (E.D.Tex.1996) (same); *see also United States v. Legro,* 284 Fed.Appx. 143, 145 (5th Cir.2008) (recognizing disagreement about whether probable cause or preponderance of the evidence standard applies to state a claim for injunctive relief under § 1345 and declining to resolve the issue). Other courts have concluded that a showing of only probable cause is required. *See United States v. Livdahl,* 356 F.Supp.2d 1289, 1294 (S.D.Fla.2005); *United States v. Fang,* 937 F.Supp. 1186, 1197 (D.Md.1996); *United States v. Davis,* No. 88-1705-CIV-ARONOVITZ, 1988 WL 168562, at *1 (S.D.Fla.1988). This Court agrees with those courts that found probable cause is the correct burden of proof[.]

c. *Evidence of Federal Health Care Offenses and Dissipation of Assets*

Pursuant to § 1345, the Court previously entered a temporary restraining order ("TRO") restraining all of Luis's assets. The Government seeks to convert the TRO into a preliminary injunction, and the Court held a hearing on that matter on February 6, 2013. As a basis for the requested injunctive relief, the Government points to the parallel criminal prosecution, where Luis is charged with violations of 18 U.S.C. § 1349 (conspiracy to commit health care fraud) and 18 U.S.C. § 371 (conspiracy to defraud the United States and to commit offenses against the United States). Luis is also charged with violation of 42 U.S.C. § 1320a-7b(b)(2)(B) (paying health care kickbacks) and a forfeiture count under 18 U.S.C. § 982. Luis was indicted by a grand jury on these charges. According to the indictment, the offenses resulted in $45 million of improper Medicare benefits being paid. The parties agree that Luis has much less than $45 million in personal assets.

At the hearing, the Court accepted three declarations of Federal Bureau of Investigation Special Agent Clint Warren ("Special Agent Warren") as direct testimony. Special Agent Warren investigated Luis's businesses, LTC Professional Consultants, Inc. ("LTC") and Professional Home Care Solutions, Inc. ("Professional") for Federal health care fraud. During the investigation, Special Agent Warren received information from nine cooperating witnesses ("CWs")

who worked as nurses and patient recruiters for LTC, Professional, or both.

The CWs said that LTC and Professional defrauded Medicare during the period of January 2006 to June 2012. Before the fraudulent scheme was put into place, Luis signed Medicare enrollment agreements in 2003, 2004, and 2005, whereby she agreed to abide by Medicare laws and regulations, including the Anti-kickback statute. According to the information provided to Special Agent Warren, LTC and Professional paid nurses to recruit patients. The nurses, in turn, gave the patients a portion of the kickbacks in the form of direct payments. The CWs also told Special Agent Warren that LTC and Professional fraudulently billed Medicare for services that were not medically necessary or were not actually provided. One CWs estimated that at least 90% of all Professional and LTC patients were receiving kickbacks. Eight of these CWs specifically identified patients who received kickbacks. The total paid by Medicare for claims submitted on behalf of these patients who were identified was $ 4,356,553.85. During the period of this fraud, however, LTC and Professional collected a total of approximately $45 million from Medicare billings.

Special Agent Warren's declarations also provided information about assets being dissipated. Luis and the other defendants transferred monies from LTC and Professional to themselves directly and by the use of shell corporations that were owned by Luis's family members. There was also evidence that

Luis used the funds to purchase luxury items, real estate, automobiles, and to travel. According to the declarations, Luis also received approximately $4,490,000 of the funds directly. In addition, although the investigation uncovered the fact that Medicare paid LTC and Professional $45 million dollars, only a fraction of the funds were located.

B. Discussion

a. *The Indictment and Declarations of Special Agent Warren Establish Probable Cause to Satisfy the Elements of § 1345*

Initially, the indictment and declarations establish probable cause to satisfy the elements for injunctive relief under § 1345. That is, there is probable cause to believe that: (1) Federal health care offenses have been committed; (2) $45 million was obtained illegally as a result of those offenses; and (3) that there has been dissipation of those monies. An indictment is sufficient to establish probable cause that offenses have been committed and the amount of the proceeds from those offenses. *See United States v. Bissell,* 866 F.2d 1343, 1349 (11th Cir.1989). Here, the Grand Jury indicted Luis for committing Federal health care offenses and found that LTC and Professional improperly obtained $45 million from those offenses.

Furthermore, in other situations where probable cause is required, the finding of probable cause may properly rest upon the affidavit of a law enforcement

officer. *See Illinois v. Gates,* 462 U.S. 213, 226, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (explaining that issuance of a search warrant may be based upon an affidavit of a law enforcement officer when based upon a proper information source). Section 1345 requires there be dissipation of the proceeds. As discussed above, in his investigation, Special Agent Warren discovered that Luis used the funds to purchase luxury items, real estate, automobiles, and for travel. In addition, the investigation uncovered the fact that Medicare paid LTC and Professional $45 million dollars, but only a fraction of the assets could be located. The declaration, which is based upon information discovered in the criminal investigation, establishes probable cause to believe that there has been dissipation of assets.

Thus, the initial requirement to obtain a preliminary injunction, restraining up to $45 million of Luis's assets, has been met.[3]

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[3] Even under the preponderance standard, the Government has carried its burden of proof to enter an injunction restraining at least $40.5 million dollars, which is 90% of $45 million. This finding is based on the indictment, as well as Special Agent Warren's affidavits detailing the crimes, receipt of Medicare funds, and dissipation of assets, including CW9's statement that 90% of LTC and Professional's patients received kickbacks.

b. *Luis's Right to a Hearing and Right to Challenge the Factual Basis of the Probable Cause Finding*

The parties disagree about whether Luis was entitled to a hearing and, if so, the scope of the hearing and whether she has the right to challenge the probable cause determination. The Government's position is that Luis has no right to challenge the factual basis of the probable cause finding, which is based solely upon the indictment and declarations of Special Agent Warren. Luis, on the other hand, argues that she is entitled to a full adversarial hearing where she should be allowed to cross-examine the CWs. In this case, Luis was permitted a hearing, where she was allowed to cross-examine Special Agent Warren but was not permitted to cross-examine the CWs.

As an initial matter, § 1345 does not require a hearing by its language. However, the Fifth Amendment provides "[n]o person shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Accordingly, the general rule is that a person cannot be deprived of property without a prior hearing. *Bissell,* 866 F.2d at 1352. However, there is an exception that exists when a criminal defendant's assets are seized or restrained. *See id.* But this exception does not mean that a criminal defendant subject to asset restraint is never permitted a hearing; a post-seizure hearing is sometimes required. *Id.*

In the criminal forfeiture context, the factors to determine whether a hearing is required are derived from the Supreme Court's Sixth Amendment speedy trial analysis in *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). *Bissell,* 866 F.2d at 1352. However, because § 1345 is a civil statute, the factors from *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) are determinative. These factors are: "the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335, 96 S.Ct. 893.

The *Mathews* factors weigh in favor of a hearing when all of a criminal defendant's assets are restrained under § 1345, which is the case here. The Eleventh Circuit has explained that "[b]eing effectively shut out by the state from retaining the counsel of one's choice in a serious criminal case is a substantial source of prejudice." *United States v. Kaley (Kaley I),* 579 F.3d 1246, 1258 (11th Cir.2009); *see also United States v. Kaley (Kaley II),* 677 F.3d 1316, 1332 (11th Cir.2012) (Edmonson, J., concurring) ("Property rights, in themselves, deserve to be amply guarded by American courts. But when a citizen's liberty depends to a high degree on his property, the stakes are particularly high."). Moreover, there is also a risk

of erroneous deprivation without a hearing: "A prosecutor has everything to gain by restraining assets that ultimately may not be forfeited. By doing so, he can stack the deck in the government's favor by crippling the defendant's ability to afford high-quality counsel." *Kaley I,* 579 F.3d at 1266 (Tjoflat, J., concurring). Although there is no indication of prosecutorial abuse in this case, the existence of these incentives increase the likelihood the risk of an erroneous deprivation without a hearing. The third factor – the government's interest and the burdens associated with additional procedural requirements – also weighs in favor of a hearing. While the Government has an interest in not previewing its criminal case before the criminal trial, this problem can be alleviated by properly limiting the scope of the hearing.

The Government, however, contends that no hearing was required because § 1345 permits restraint of substitute assets that are not traceable to criminal activity. As discussed above, the indictment and declarations establish probable cause to believe that Luis committed Federal health care offenses, resulting in $45 million of improper Medicare benefits being paid, and that she has dissipated those assets. There is also no dispute over the fact that Luis is in possession of much less than $45 million in personal assets. As such, assuming the probable cause finding is correct, because § 1345 permits the restraint of substitute assets, there is no possibility that a preliminary injunction could reach assets that are not properly subject to restraint under § 1345.

Therefore, the Government's position is that there is nothing that could be challenged at a hearing because Luis "may not challenge the validity of the indictment itself. " *Bissell,* 866 F.2d at 1349.

However, the Government's position on the due process right to a hearing was rejected by *Kaley I.* In that case, the district court found that there was probable cause to believe that certain assets were traceable to a criminal offense and, therefore, properly subject to a protective order restraining the property. *Kaley I,* 579 F.3d at 1256. Relying on *Bissell,* the district court further found that an evidentiary hearing was not required because the defendants were not permitted to challenge the validity of the indictment. *Id.* The *Kaley I* court found that the district court erred on this point. *Id.* at 1257-58. According to the opinion, "notwithstanding the probable cause determination, the [defendants] were entitled to challenge the restraints on their assets; in doing so, they would not be requiring the Government to establish the charged offense." *Id.* at 1258.

In accordance with her due process right to a hearing, Luis was permitted an evidentiary hearing and the opportunity to cross examine Special Agent Warren. Contrary to Luis's position, however, she had no right to cross-examine the CWs. This type of extensive hearing would be tantamount to requiring the Government to preview its entire case. However, for the reasons discussed above, the Government's position that Luis was not permitted to a hearing and

is not permitted to challenge the initial probable cause finding is misplaced.

c. *Luis's Arguments Opposing a Preliminary Injunction*

Luis raises two arguments challenging the factual basis for probable cause. First, she argues that the Government has not proffered evidence of a violation of the Anti-kickback Statute, 42 U.S.C. § 1320a-7b(b)(2)(B). According to Luis, in this case, payment of kickbacks falls within the safe-harbor provision of 42 C.F.R. § 1001.952 because the payments were to employees of LTC and Professional. Luis further argues that there is no evidence of a violation of 18 U.S.C. §§ 1347, 1349 because the Medicare certifications she signed were submitted before the alleged kickback scheme took place.

Additionally, Luis makes several other arguments challenging the entering of a preliminary injunction in this case. She argues that the application of § 1345 violates the *ex post facto* clause. Luis further argues that the Sixth Amendment requires the release of funds to pay attorney's fees and argues that the language of § 1345 does not permit the restraint of assets needed for attorney's fees. Each of these arguments is discussed below.

i. The payment of kickbacks in this case do not fall within the safe-harbor provisions of the Anti-kickback statute

Luis first contends that some of the payments made to nurse/patient recruiters do not violate the Anti-kickback statute, § 1320a-7b(b)(2)(B).[4] To support this position, she relies upon the "safe-harbor" provision contained in 42 C.F.R. § 1001.952, which provides:

As used in section 1128B of the Act, "remuneration" does not include any amount paid by an employer to an employee, who has a bona fide employment

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[4] Section 1320a-7b(b)(2)(B) provides:

(1) Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind –

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

42 U.S.C. § 1320a-7b(b)(2)(B).

relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs.

42 C.F.R. § 1001.952. A similar safe-harbor provision is contained in the statute itself. That version of the safe-harbor provides that the prohibition against paying kickbacks will not apply to "any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services." 42 U.S.C. § 1320a-7b(b)(3)(B).

Special Agent Warren's declaration indicates that CW1, CW2, CW3, and CW6 were employees of LTC, Professional, or both. Based on this, Luis argues that these individuals fall into the ambit of the safe harbor and contends that payments to them for recruiting patients were not improper. According to Luis, the safe-harbor will apply so long as "payments to them for referring patients [generated revenue] for services rendered and medically necessary." As such, Luis contends that $1,826,746 of revenue generated by payment patient referrals was not generated illegally. However, Luis misinterprets the scope of the safe-harbor provisions.

For either safe-harbor provision to apply, the remuneration must have been made to the employee for furnishing or providing covered items or services or for items or services payable under Medicare. This is evident from the text of the safe-harbor provisions,

as well as the Eleventh Circuit's decision in *United States v. Starks,* 157 F.3d 833 (11th Cir.1998). The text of the safe-harbor provision upon which Luis relies states that "remuneration" does not include "any amount paid by an employer to an employee *in the furnishing* of any item or service for which payment may be made in whole or in part under Medicare." 42 C.F.R. § 1001.952 (emphasis added). Similarly, the safe harbor contained in § 1320a-7b states that it will apply to "any amount paid by an employer to an employee *for employment in the provision* of covered items or services." § 1320a-7b(b)(3)(B) (emphasis added). The emphasized language in both of these provisions makes clear that the safe-harbor provisions will only apply when payments made to an employee compensate the employee for furnishing or providing covered items or services or items or services payable by Medicare, not simply for referring patients.

This was also the Eleventh Circuit's view in *Starks,* 157 F.3d at 839, where the court considered a vagueness challenge to the employee safe-harbor provisions. In that case, two individuals (Angela Starks and Barbara Henry) were paid for referring patients to Future Steps, Inc, which was a "corporation that developed and operated treatment programs for drug addiction." *Id.* at 835. Although Starks and Henry referred patients, they did not personally provide any medical services. *Id.* at 835-36. Starks, Henry, and Andrew Siegel, the owner of Future Steps, were convicted of violations of the Anti-kickback

statute. *Id.* at 837. Starks and Siegel appealed their convictions, arguing that the safe-harbor provision contained in § 1320a-7b is unconstitutionally vague. *Id.* at 839. Rejecting this argument, the court found that, even if Starks and Siegel believed they were bona fide employees, the safe-harbor was not vague, as applied, because Starks and Henry were not compensated for providing "covered items or services." *Id.; see also United States v. Borrasi,* 639 F.3d 774, 782 (7th Cir.2011) (finding as long as some portion of a payment is for referrals, the safe-harbor provisions will not apply).

Here, Special Agent Warren's declaration states that CW2, CW3, and CW6 were paid for recruiting patients.[5] Even if these patients ultimately received legitimate medical care, payments to these nurse/recruiters for referring patients to LTC and Professional violate the Anti-kickback statute. Therefore, it is irrelevant whether the nurses were bona fide employees paid for "covered items or services" because the payments to them were, at least in part, for their illegal patient referrals.

Furthermore, even if Luis's view of the scope of the safe harbor provisions were correct, her contention that the patients, who were referred by these CWs, received medically necessary services is dubious.

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[5] Although Luis refers to CW1 when making this argument, CW1 was not a patient recruiter and, therefore, is not relevant to her argument.

According to the declaration, after patient recruiters were compensated for referring patients, "LTC and Professional would then fraudulently bill Medicare for home health services that were not medically necessary or were never provided." For this additional reason, the safe-harbor provisions do not apply here.

ii. There is probable cause to establish a knowing misrepresentation to Medicare sufficient to constitute violations of 18 U.S.C. §§ 1347, 1349

Luis further argues that there is not sufficient evidence to find that there has been a knowing misrepresentation sufficient to amount to a violation 18 U.S.C. §§ 1347, 1349[6] and, therefore, the Government cannot establish "Federal health care offenses" to restrain her assets under § 1345. To support this argument, Luis argues that a violation of §§ 1347, 1349 requires her to submit a representation that she

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[6] Section 1347 provides, in pertinent part:

> (a) Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice –
>
> (1) to defraud any health care benefit program; or
>
> (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program.

18 U.S.C. § 1347. Section 1349 makes conspiracy to violate § 1347 a crime. *See* 18 U.S.C. § 1349.

will comply with Medicare rules *during* the period of time she submits improper Medicare claims. This argument fails because, as discussed below, all that is required is that a certification of compliance be submitted *at some point before* a non-complying claim is knowingly submitted. That requirement is satisfied here.

Luis's [sic] erroneously relies upon *United States v. Medina*, 485 F.3d 1291 (11th Cir.2007). One issue considered in *Medina* was whether there was sufficient evidence of health care fraud to sustain convictions against four individuals who were convicted for violations of § 1347. *Id.* at 1295. The court first found that a conviction under § 1347 requires the defendant make a "knowing false or fraudulent representation to Medicare." *Id.* at 1298. The court then found that, as to one of the defendants, her conviction for violation of § 1347 that was based on claims submitted before she signed Medicare provider applications (agreeing to abide by Medicare rules) should be reversed because there was no evidence of a knowing, false representation. *Id.* at 1298. However, the convictions that were based on kickback tainted claims that were submitted after she signed Medicare provider applications were upheld. *Id.* As to those counts, there was sufficient evidence to sustain the convictions because the defendant made a knowing false or fraudulent representation to Medicare by signing the provider applications, promising to comply, and then knowingly submitted tainted claims to Medicare. *Id.*

In this case, Luis acknowledged that she signed Medicare enrollment applications in 2003, 2004, and 2005 and, by doing so, certified that she would abide by Medicare law. There is evidence that she later submitted claims that violated the law, including the Anti-kickback provision. Under *Medina,* it does not matter that the representations in certifications were made several years before the claims were submitted. All that is required is that there is a representation that one will comply with Medicare law followed by a knowingly non-compliant claim. Therefore, by allegedly submitting non-compliant claims to Medicare after signing the applications, the knowledge requirement of § 1347 and § 1349 is satisfied for purposes of § 1345.

Luis makes an additional argument that the Government must demonstrate the United States suffered a "loss" to restrain assets under § 1345. In Luis's view, despite the payment of kickbacks, the United States does not suffer a loss as long as medically necessary services are performed. This argument fails because § 1345 does not require the United States to suffer a loss. All that is necessary is that a person is "alienating or disposing of property, or intends to alienate or dispose of property" that is "obtained as a result of a Federal health care offense. " § 1345.

iii. The application of § 1345 to this case does not violate the ex post facto clause

Luis further argues that the *ex post facto* clause, contained in Article I, Section 9 of the U.S. Constitution, prohibits § 1345 from applying here. Luis points out that the statutory term "Federal health care offense" did not include payment of kickbacks until March 23, 2010. *See* 18 U.S.C. § 24 (prior to 2010 amendment). Therefore, § 1345 did not authorize the restraint of assets based upon payment of kickbacks until that date. Luis argues that because the Government's proffer of evidence relates solely to kickbacks that occurred before March 2010, restraint of assets is not permitted.

However, even assuming that the *ex post facto* clause is implicated by § 1345, Luis's argument is fundamentally flawed. The prior version of § 24, which defines the term "Federal health care offense," included violations of the general conspiracy statute, 18 U.S.C. § 371. *Id.* A violation of § 371 was included in the definition of Federal health care offense to the extent that the crime involved "a health care benefit program." *Id.* The term "health care benefit program" was defined as "any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract." *Id.* Accordingly, under the older version of the statute, a conspiracy

to pay kickbacks to receive benefits under Medicare in violation of § 371 was a Federal health care offense and could properly result in an injunction under § 1345. *See id.*

Here, the indictment charges Luis with a count for conspiracy to pay kickbacks in violation of § 371. In addition to establishing probable cause to believe the Anti-kickback statute has been violated, the evidence before the Court is sufficient to establish probable cause to believe that § 371 has been violated and resulted in $45 million of improper Medicare benefits being paid. Thus, even under the older version of § 24, an injunction could be entered under § 1345 for violation of § 371. As such, there is no *ex post facto* issue.

iv. The Sixth Amendment does not prohibit the restraint of substitute, "untainted" assets

Luis also argues that the Sixth Amendment guarantees her a right to use assets that are not traceable to Federal health care offenses to select and retain counsel of her choice for her defense in the parallel criminal case. The Government's argument is that regardless of whether or not assets were obtained legitimately, there is no Sixth Amendment impediment to the assets being frozen as long as a statute permits restraint of substitute assets. According to the Government, because § 1345 allows substitute, untainted assets to be restrained, Luis has no

Sixth Amendment right to use the assets to hire counsel of her choice.

It is undisputed that "an element of [the Sixth Amendment right to counsel] is the right of a defendant who does not require appointed counsel to choose who will represent him." *United States v. Gonzalez-Lopez,* 548 U.S. 140, 144, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). Indeed, "[t]he Sixth Amendment comprehends a qualified right to select and be represented by counsel of choice because 'were a defendant not provided the opportunity to select his own counsel at his own expense, substantial risk would arise that the basic trust between counsel and client, which is a cornerstone of the adversary system, would be undercut.'" *Bissell,* 866 F.2d at 1351 (quoting *United States v. Koblitz,* 803 F.2d 1523, 1528 (11th Cir.1986)). However, this qualified right does not permit a criminal defendant to use assets that are the proceeds of criminal activity to retain counsel. *Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 626, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989); *Bissell,* 866 F.2d at 1351. This is so because "[a] defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those assets are the only way that that defendant will be able to retain the attorney of his choice." *Caplin,* 491 U.S. at 626, 109 S.Ct. 2646.

The more difficult question is the one presented here. That is, whether a criminal defendant has a Sixth Amendment right to use untainted, substitute assets to retain counsel of choice. Although the answer

to this question is far from clear, the Fourth Circuit's opinion in *In re Billman*, 915 F.2d 916, 921 (4th Cir.1990) supports the Government's position. In *Billman*, a defendant was charged with racketeering and a forfeiture count, and the defendant then transferred some of the assets to another person. *Id.* at 918. The district court found that the assets that were transferred could not be directly linked to the racketeering, and the circuit court determined that it was bound to accept this finding. *Id.* As such, they were "substitute" assets. *Id.* at 920. The transferee argued that she had a Sixth Amendment right to use the funds to retain counsel of her choice. *Id.* at 921-22. The court rejected this argument because the substitute assets were subject to restraint under § 1963. *Id.* Therefore, the *Billman* court's view is that there is no Sixth Amendment impediment to the seizure of substitute assets pursuant to the statute because those assets are "contraband," even if they were not the proceeds of criminal activity. *Id.* at 922; *see also United States v. Am. Therapeutic Corp.*, 797 F.Supp.2d 1289, 1293-94 (S.D.Fla.2011) (finding no Sixth Amendment right to use untainted, substitute assets that are restrained under § 1345).

This view is common sense. An example by the Fourth Circuit that was related by the *Bissell* decision is instructive:

> Suppose a bank is robbed and $100,000 taken. A defendant is arrested in possession of $100,000 and nothing more. The defendant protests his innocence and claims, without

> the slightest proof, that the $100,000 was in fact a gift from a friend. Surely no one will contend that the $100,000 must be made available to pay the defendant's lawyer, and not be kept available for return to the bank in the event the defendant is found guilty.

Bissell, 866 F.2d at 1351 (quoting *In re Forfeiture Hearing As to Caplin & Drysdale, Chartered*, 837 F.2d 637, 645 (4th Cir.1988), *aff'd sub nom., Caplin*, 491 U.S. 617, 109 S.Ct. 2646).

The reason the bank robber is not permitted to use the $100,000 to hire a lawyer is obvious. The money does not belong to him. But suppose the bank robber in the example above spent the $100,000 that he stole. It just so happens, however, that he has another $100,000 that he obtained legitimately. Should his decision to spend the $100,000 he stole mean that he is free to hire counsel with the other $100,000 when Congress has authorized restraint of those substitute assets? The reasonable answer is no. The bank has the right to have those substitute, untainted assets kept available for return as well. Therefore, in accord with the Fourth Circuit's view, the most reasonable conclusion is that there is no Sixth Amendment right to use untainted, substitute assets to hire counsel.

v. Section 1345 allows for the restraint of assets that would otherwise be used for payment of attorney's fees

Luis also argues that the purpose of § 1345 is to insure that the defendant is not wasting or hiding assets, not to punish the defendant. As such, she argues that assets that will be used for attorney's fees should not be restrained. To the extent that Luis is arguing that the statute does not permit such assets to be restrained, this argument fails. However, the Court does have discretion to release assets for payment of attorney's fees.

In exercising its discretion for release of assets for payment of attorney's fees, the Court should consider whether the defendant is able to afford representation in the § 1345 proceedings. *See United States v. Speqtrum, Inc.*, No. CIV. A. 10-2111 JEB, 2012 WL 517526, at *2 (D.D.C. Feb. 16, 2012); *United States v. Jaime*, No. 2:10-CV-00498, 2011 WL 145196, at *1-2 (S.D.W.Va. Jan. 18, 2011). If "restrained property is a defendant's only means of securing counsel" the Court may wish to exercise its discretion to release assets to secure counsel. *See Speqtrum, Inc.*, 2012 WL 517526, at *2. In this case, Luis was represented throughout the § 1345 proceedings by competent counsel. Therefore, this consideration is no longer relevant. In the criminal prosecution, Luis will be appointed counsel if she cannot afford representation.

C. Conclusion

For the foregoing reasons, the Government's Motion for a Preliminary Injunction under 18 U.S.C. § 1345 [D.E. # 4] is GRANTED. The preliminary injunction order will be entered shortly. Luis's Motion to Modify the Restraining Order to Release Assets for the Defense of the Related Criminal Case [D.E. # 46] is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-13719-DD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SILA LUIS,

Defendant-Appellant,

ELSA RUIZ, et al.,

Defendants.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Jul. 9, 2014)

BEFORE: MARTIN, DUBINA and SENTELLE,* Circuit Judges.

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* Honorable David Bryan Sentelle, United States Circuit Judge for the District of Columbia Circuit sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE